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MEDIATION NEWS FOR THE 21ST CENTURY™

MEDIATION NEWS

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TIPS FOR ADVOCATES AND ATTORNEYS IN MEDIATION

Mediation is effective. Its greatest advantage is the flexibility of the process to adapt to the circumstances, dynamics, special facts and specific needs of the parties. Proper preparation is key. In representing your client in a mediation, keep these points in mind:

- **Pick a good time**. The right time depends, of course. Earlier is usually better, but not too early. Parties need enough information to be able to make practical and productive business and personal decisions. Often, mediations can be successful without incurring the expense of costly formal discovery and depositions. Take action before the costs of litigation becomes itself an issue or obstacle to resolutions.

- **Prepare yourself.** Know your case. Understand the strengths and weaknesses of your case and that of the other parties. Assess whether you have the participation and involvement of all necessary parties (insurer, decision makers, influencers, co-responsible and affected parties). Understand and determine whether the perceptions and motivations of the other party(ies) are driving, helping or hindering the negotiations. Discuss this fully with your client and the mediator. Identify and understand whether missing information, misperceptions and other barriers to settlement and the factors (factual, legal, economic, psychological, personality, relational, procedural) are driving the controversy or blocking progress in the negotiations. Enlist the assistance of the mediator to obtain or arrange production of critical factual information, correct misperceptions and to help parties recognize and remove such barriers. Mediators can help to provide parties with a meaningful reality check.

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We have to be in the present time, because only the present is real, only in the present moment can we be alive. We do not practice for the sake of the future, to be reborn in a paradise, but to be peace in, to be compassion, to be joy—right now ~ Anon.

- **Set the right tone for the mediation.** Be personable and professional. Avoid actions, ultimatums, statements or emotionally hurtful words that may jeopardize the trust and good will of the parties and advocates necessary and conducive to productive negotiations.

- **Prepare the Mediator.** Meet early with your mediator. Arm the mediator with a short and succinct pre-mediation statement that contains the necessary, focused and critical information, excerpts of contracts, communications and documents that will quickly and efficiently educate and prepare your mediator on the issues, personalities and dynamics of the case. Decide whether you want to give a shared pre-mediation statement to the mediator and to the other parties. You can also give a confidential "for the mediator's eyes only" pre-mediation statement. Be clear as to what information you want the mediator to keep confidential unless permission is later given to disclose such information when you determine it is appropriate. Two of the main reasons why mediations fail are the non-participation of necessary parties and decision makers and the lack of necessary information to permit the making of good business decisions. Discuss whether all potential and necessary parties have been identified and are actively engaged, informed and participating in the mediation. Assess whether the mediator can assist in accelerating discovery and exchange of critical and pertinent information. Often this can be done without the delay and cost of formal discovery process. Determine if identification, review and tenders have been made for all potentially applicable policies of insurance and/or surety bonds. Are the parties ready to settle? Are the insurers adequately informed?

- **Educate the other side.** The other parties need to know that you are able and prepared to take the matter to trial but you are interested in effecting a reasonable and appropriate resolution. Be strategic in protecting and reserving potentially powerful bombshell evidence, witnesses or documents for trial or arbitration. But, you will need to determine what information you want the other parties to know and understand regarding the strengths of your case. It is good to make sure all claims and material defenses are on the table so that surprise claims do not derail productive discussions. Decision makers and insurers need to be properly prepared all legitimate claims. Surprise claims and defenses can trigger feelings of bad faith and cause a delay or shutdown of negotiations.

- **Joint sessions or keep the parties apart?** Work with the mediator to design a productive and positive mediation process, given the specific circumstances and dynamics involved in your case. Every case has unique characteristics, personalities and dynamics. Work with your mediator to set the proper stage and tone of the mediation. Increasingly, advocates favor dispensing with joint sessions where summary presentations of critical facts and claims are made. Advocates generally believe that counsels are aware of the facts and legal issues and are concerned that parties and advocates will posture and harden positions with formal opening statements and argument. Research suggests that it is beneficial for parties to meet, be introduced and to see each other as whole human beings wanting to find solutions and that just having parties sit in separate rooms (in person or virtually) allows parties to demonize the other parties and wallow in their negotiation biases. Sometimes, a mediation

session can be a very valuable opportunity to speak to the mediator and the other party. Joint sessions can be extremely productive if the participants are collaborative, but they can be entirely destructive to the mediation process when they are not. A joint session gives the parties the opportunity to tell each other that they have come to the mediation in good faith and with a desire to resolve the matter. Joint sessions are also efficient to aid the principals to exchange information directly, confirm and clarify factual issues and brainstorming ideas for settlement. Use joint sessions purposely and when they can be productive. Again, there are many opportunities to shape and customize a mediation process to fit the people and the circumstances.

- **Prepare your client.** Every case has strengths and weaknesses. Make sure your client understands and is aware of them. Clients also don't like unpleasant surprises. Educate your client about what might be expected from the mediation process. Be clear about your client's real interests and needs and how they relate or differ from their legal positions and potential outcomes in a contested litigation or arbitration. It is important to have an honest and realistic discussion with your client about the potential fees and costs of litigation, appeals, delay and the net recovery and collectability of any judgment or award that might be achieved.

- **Should your client speak?** Consciously decide whether your client/representative can an articulate, effective and active participant in the mediation. Consider who will be the most effective representative participating on behalf of your client. Consider whether your client/representative should make a direct presentation of some or all of an opening statement to the other party(ies). Identify whether there are special, real world business or personal relationships, personalities, procedural problems or other considerations that may impact the negotiations. Consider the emotional and relationship aspects of the situation. Would a timely and meaningful apology or a demonstration of sincere empathy be important to defuse anger or hurt felt by another party? Is it important that the other party have an opportunity to vent and express concerns directly to a key party representative?

- **Be creative and open to possibilities.** Take advantage of the flexibility of the process. Mediation allows for tailored, customized resolutions, including elements that may not be legally achieved or obtained from a judge or arbitrator. You and your client should be prepared to listen and look for all possible options and packages of possible solutions. Understanding the stated and unstated needs, hopes and dreams of your client and those the other party(ies) can help to fashion resolutions tailored to meet yours and their special needs and interests. Parties do not need to agree on the facts to settle. The key is that parties appreciate the risks and benefits of various settlement options and how they meet their particular needs and interests.

- **Identify multiple options** that might be the basis for a mutually negotiated resolution. The more options and components of options that can be identified, the more likely a resolution will be reached that is acceptable to all parties. Many times, solutions are not the ones thought of prior to mediation.

- **Engage and involve the decision makers.** Mediation is a dynamic process. Make sure that all necessary parties are

participating meaningfully in the mediation, decision makers should have full authority and flexibility to agree to solutions and packages proposed. This is not always possible. Organizations, Boards of Directors, insurance risk managers, government agencies sometimes cannot be actively engaged in the full dynamic discussions and negotiations that occur in mediation. As much as possible, work to get decision makers with true full and flexible settlement authority actively involved in the mediation and/or immediately reachable and available to make a binding decision.

- **Document the resolution.** When an agreement is reached, it ideally should be confirmed and documented immediately before leaving the mediation. It is good sometimes to have a draft "standard" settlement agreement prepared before the mediation or near the end of a mediation that parties can consider. Consider using and editing jointly a single text of the draft settlement agreement. At the minimum, have an enforceable agreement approved and initialed by all parties before concluding the mediation. Include a recital that the term sheet or agreement is intended to be an enforceable agreement to settle. Consider incorporating a dispute resolution or fast track arbitration mechanism to resolve disagreements over "formal" settlement documents. Consider alternative methods for confirming a binding settlement. Call the court to arrange for an opportunity to place the settlement on the record. Utilize "DocuSign" or similar electronic means to confirm a settlement. Have an exchange of emails from the decision makers that confirms the settlement.

- **Keep the mediator's role and function distinct from that of an adjudicator.** Combining mediation and arbitration functions (med-arb) in a single person is not generally recommended. Parties need to have trust and confidence in the mediator. Mediation works best when no one fears that something said in mediation to a mediator might be prejudicial if the matter later goes before the same neutral then serving as an arbitrator.

- **A note on virtual or in person mediations.** The ease and convenience of Zoom meetings presents many advantages. As a mediator, I find that participants are more engaged and the resolution of issues is often better handled through in person discussions. This is especially true when important relationships and emotion are involved. So, please give thought to whether your parties and their specific situation might be more productively and beneficially conducted in face to face meetings and discussions.

  Through mediation, parties maintain a greater degree of control over the outcome and resolution of their conflict... usually with substantial savings of cost, time, opportunities and aggravation. When parties are willing to mediate in a good faith attempt to search for resolutions to mutual problems, they nearly always succeed.

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